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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ROBIN BAIN, an Individual,

Plaintiff,

v.

FILM INDEPENDENT, INC., a  
California Corporation, doing business  
as the “LA Film Festival”; LA MEDIA  
WORKS, CORP. a business entity of  
unknown form; JESSICA HAID a.k.a.  
“Jessica Cesaro”, an Individual; and  
DOES 1-10,

Defendants.

JESSICA TAYLOR CESARO  
professionally known as “JESSICA  
HAID,” an Individual,

Counter-Claimant,

v.

ROBIN BAIN, an Individual; and DOES  
11-20,

Case No.: 2:18-cv-04126-PA(JEMx)

**DEFENDANT / COUNTER  
CLAIMANT JESSICA HAID’S  
REPLY IN SUPPORT OF  
JESSICA HAID’S MOTION FOR  
SUMMARY JUDGMENT  
AND/OR ADJUDICATION**

*[Declaration of Jessica Haid,  
Declaration of John R. Baldivia, and  
Statement of Uncontroverted Facts and  
Conclusions of Law, and Reply to  
Plaintiff’s Statement of Disputed Facts  
filed concurrently herewith]*

DATE: August 10, 2020  
TIME: 1:30 p.m.  
JUDGE: Percy Anderson  
COURTROOM: 9A

COMPLAINT FILED:  
May 16, 2018  
FINAL PRETRIAL CONFERENCE:  
October 8, 2020  
TRIAL DATE:  
October 13, 2020

**DEFENDANT / COUNTER CLAIMANT JESSICA HAID’S REPLY IN SUPPORT OF  
JESSICA HAID’S MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION**

Counterclaim-Defendants.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Jessica Cesaro, professionally known as Jessica Haid (“Haid”), hereby  
3 submits this Reply in support of her Motion for Summary Judgment (“MSJ”) [Dkt.  
4 115-1].

5 **I. ARGUMENT**

6 **a. All of Haid’s Allegedly Infringing Conduct was For a Purpose that**  
7 **is Transformative in Use**

8 Haid’s allegedly infringing acts are protected by fair use because the acts  
9 were performed for a transformative purpose. Haid never had any intention to  
10 distribute the Film or her Reel to the general public with the purpose of capitalizing  
11 on the Film’s market for her own financial gain.

12 Haid’s only purpose for sharing the Film with LA Media was so that LA  
13 Media could create the Reel. Statement of Uncontroverted Facts in Support of  
14 Reply (“SUF”) ¶ 119. Furthermore, Haid’s only purpose for having LA Media  
15 create the Reel was so that she can demonstrate the range of her acting abilities to  
16 potential casting directors. *Id.* Haid did not have possession of any acting reel that  
17 was prepared by Robin Bain. *Id.* ¶ 120. Although Haid provided LA Media with  
18 other sources of content to create the Reel, it was LA Media’s decision not to use  
19 any source other than the Film. *Id.* ¶ 121. Haid never shared a copy of the Film or  
20 the Reel with anyone else besides LA Media. *Id.* ¶ 122. The only reason that Haid’s  
21 family friend, Amy Oosterhouse (“Oosterhouse”), may have commented on the  
22 Reel to LA Media is because Haid may have shown Oosterhouse the Reel in person.  
23 *Id.* ¶ 123. Haid never sent Oosterhouse a copy of the Reel. *Id.* Oosterhouse was  
24 never told that Haid direct, produced, or created the Film. *Id.* ¶ 124. Oosterhouse  
25 was aware of Haid’s role in the Film, and referred Haid to LA Media so that Haid  
26 could hire them to create an acting reel. *Id.* ¶ 125.

27 Bain argues that Haid downloaded a copy of the Reel on February 28, 2017  
28

1 and maintained a copy in her possession even after Peter Shimamoto delivered a  
 2 cease and desist letter to Haid. This argument is constructed upon information that  
 3 has been grossly misconstrued by Bain’s counsel, Justin Gomes. Haid’s counsel  
 4 previously informed Mr. Gomes that Haid complied with Peter Shimamoto’s cease  
 5 and desist letter in good faith so that she would “not get sued” by Bain. *Id.* ¶ 126.  
 6 While Mr. Gomes recalls this conversation in an attempt to burden the Court with  
 7 specious allegations of spoliation, Mr. Gomes omits that, in the same conversation,  
 8 Haid’s counsel informed Mr. Gomes that LA Media’s counsel produced a copy of  
 9 the Reel to Haid’s counsel after this lawsuit commenced. *Id.* ¶ 127. LA Media  
 10 made a DVD copy of the Reel that was made available to Haid in February 2017,  
 11 and delivered the DVD copy to Haid’s counsel on November 19, 2018. *Id.* ¶ 128.  
 12 Thus it is no surprise that the “Media Create Date” would say “2017:02:28” *Id.*

13 Furthermore, whether or not Haid inadvertently held a copy of the digital  
 14 video file of the Film in her Google Drive is of no consequence because it was never  
 15 shared with anyone besides LA Media. *Id.* ¶ 129. Unfortunately for Haid, her  
 16 technological ineptitude has come to haunt her. Having forgotten she had forgotten  
 17 to look in her Google Drive, Haid had no idea that a copy remained in her Google  
 18 Drive until Bain raised it on Opposition. *Id.* ¶ 130.

19 Bain also claims that Haid manipulated the “owner” information of the Film  
 20 to identify herself as the owner. However, Bain’s argument simply misconstrues  
 21 Google Drive’s mechanics. The “owner” information, as used in this sense, only  
 22 proves that a digital copy of the video file was created in Haid’s Google Drive.  
 23 Haid does not know how to manipulate the metadata of a digital video. *Id.* ¶ 131.  
 24 Furthermore, Haid had no knowledge that receiving a copy of the Film in her  
 25 Google Drive would alter the metadata or copyright management information  
 26 (“CMI”) of the digital video file. *Id.* According to Bain, this digital file still  
 27 contains the CMI that reads “Property of LesLin Films 2016.” Bain’s Opposition  
 28

1 to MSJ (“Opposition”), Ex. 12. Thus, when Haid shared the digital file with LA  
 2 Media, LA Media clearly saw the CMI, and through its own standard procedure,  
 3 removed the CMI from the digital video file without any instruction from Haid.  
 4 SUF ¶ 132.

5  
 6 **b. Bain’s Grossly Exaggerated Arguments Do Not Tip the Scales**  
 7 **Against a Finding of Fair Use**

8 Despite Bain’s widely exaggerated arguments in Opposition to Haid’s MSJ,  
 9 the facts heavily weigh in favor of a finding of fair use. Bain’s argument is largely  
 10 premised on the wild idea that the Reel (which uses at *best* a total of 4% of the  
 11 Film’s footage and dialogue), which is intended for casting directors viewing only,  
 12 serves as a substitute for the Film itself, and has the potential to affect the market  
 13 for the Film with disastrous results.

14 As discussed in the MSJ, the Reel is intended solely for informational  
 15 purposes as to Haid’s acting ability, which is contrary to the Film’s purpose of  
 16 entertaining and telling the story of the Film. The Reel only takes the amount  
 17 necessary to demonstrate the range of Haid’s acting prowess. Importantly, the Reel  
 18 had absolutely no impact on the Film’s ability to gain critical acclaims, obtain  
 19 distribution, or garner widespread reception from the general market.

20  
 21 *i. Purpose and Character of the Use*

22 Bain argues that an “accused work is not transformative if an audience can  
 23 use that accused work in the same way it would use the original.” To say that the  
 24 Reel can serve as a substitute for the Film is an incredible stretch. Bain would be  
 25 hard-pressed to find a reasonable person who can attest that watching the Reel is  
 26 the functional equivalent of watching the Film. As discussed in the MSJ, the scenes  
 27 from the Film are depicted out of context and out of order in the Reel. Because of  
 28

1 this, the Reel fails to effectively tell the story of the Film at all.

2 Bain misses the point entirely by arguing that the allegedly infringing scenes  
3 in the Reel “illicit the same emotional response in the audience as the Film’s use of  
4 the same.” The very informational purpose of the Reel is to demonstrate that Haid  
5 is capable of conveying emotion through her acting. Even Bain herself provides  
6 evidence that the very purpose of an acting reel is to “convince a casting director to  
7 call an actor to audition for a role” [Opposition, Ex. 18, Dkt. 124-19] and the “demo  
8 reel is quickly becoming the most important part of professional casting”  
9 [Opposition, Ex. 17, Dkt. 124-18]. Of course Haid’s performance in the Reel will  
10 convey the same emotional response as in the Film – that is the very informative  
11 purpose that the Reel is intended for. The difference is that the Reel does not  
12 provide any context to the story, and therefore cannot convey the story of the Film.

13 Bain further argues that the Reel is not transformative because it does not  
14 comment on the Film. Again, this is missing the point of the Reel. The Reel is a  
15 visual display of Haid’s acting ability within the Film, used for the purpose of  
16 convincing casting directors to grant Haid an audition in a future role. The Reel,  
17 by its very nature, is a commentary of Haid’s acting performance within the Film.

18 Finally, Bain further argues that the Reel is not transformative because the  
19 Reel is commercial in nature. Courts have not precluded a finding of transformative  
20 use simply because a secondary work was created for commercial purposes. *See*  
21 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (commercial parody of  
22 Roy Orbson’s song “Pretty Woman” was fair use). Nevertheless, the Reel is *not*  
23 commercial in the same sense that the Film is commercial. The Reel is evidence of  
24 Haid’s talent, and is “even more important than headshots and resumes” when  
25 securing auditions [Opposition, Ex. 17, Dkt. 124-18]. The “advertisement” purpose  
26 of the Reel promotes Haid’s acting ability, not a competing motion picture. Haid  
27 does not sell her Reel in order to steal revenue from the Film’s audience on Amazon  
28



1 Prime or other streaming video on-demand service. SUF ¶ 135.

3 *ii. Nature of the Original Work*

4 Again, the nature of the Reel is informative of Haid's acting abilities. Bain  
5 argues scope of fair use is narrower in this case since the Film is allegedly  
6 "unpublished." However, the Film was *not* unpublished. As previously stated, the  
7 Film was publicly exhibited in theaters on the following dates:

- 8 • May 26, 2016 at the IFS Film Festival in Los Angeles, California;
- 9 • October 21, 2016 at the LA Femme Film Festival in Beverly Hills,  
10 California;
- 11 • October 25, 2016 at the Twin Cities Film Festival in Minneapolis,  
12 Minnesota;
- 13 • November 6, 2016 at the ARPA International Film Festival in Hollywood,  
14 California;
- 15 • November 23, 2016 at the Newfilmmakers New York in New York City,  
16 New York.

17 SUF ¶ 136.

18 Title 17 U.S.C. § 101 defines "Publication" as "the distribution of copies or  
19 phonorecords of a work to the public by sale or other transfer of ownership, or by  
20 rental, lease, or lending." In 2016 alone, tickets to see the Film in theaters were  
21 being sold to the general public in Los Angeles, and possibly other cities. SUF ¶  
22 137. By the time LA Media created the Reel, the Film had already been receiving  
23 critical acclaim at numerous film festivals. Declaration of Robin Bain in Support  
24 of Opposition ("Bain Decl.") ¶ 11. This is therefore not a case where Bain had lost  
25 her opportunity to transact the "first sale" of her Film.

26 Although Bain further argues that Haid was required to "keep confidential all  
27 written, creative, technical and financial details" of the Film, no case has ever  
28



1 decided that a finding of fair use requires obtaining consent from the original author.  
2 Haid did not “publish” the Film or the Reel on the internet. The Film was not  
3 viewable on the internet without access to the private url link to Haid’s Google  
4 Drive. Furthermore, the Reel was not “published” on LA Media’s website for  
5 public consumption. The only reason the Reel was searchable online was due to  
6 inadvertent disclosure by LA Media. Thus, this argument does not support a finding  
7 against fair use.

8  
9 *iii. Amount and Substantiality of the Portion Used*

10 By take a closer look at the quantity of footage that Bain claims are  
11 “substantial portions” of the Film, one can grasp how *unsubstantial* the secondary  
12 use of the Reel actually is. For the sake of argument, the comparison below pertains  
13 to the longer version of the Reel, which Bain frequently cites to in her Opposition.

14 When comparing the length of the Reel versus the length of the Film, the  
15 amount at issue in this case is trivial in nature. The longer version of the Reel is 3  
16 minutes and 39 seconds in length. SUF ¶ 139. Compared to the 95-minute Film,  
17 the Reel consists of only 3.8% of the Film’s footage. *Id.* Over 90% of the footage  
18 in the Reel depicts Haid’s image on screen. *Id.*

19 Any casual viewer of the Film will recognize that Haid appears in much less  
20 than 90% of the footage of the Film. *Id.* Fair use has certainly been found in cases  
21 where a secondary work uses comparatively *more* that this Reel uses of the Film.  
22 *See Campbell*, 510 U.S. 569 (creating a commercial parody of the Roy Orbson’s  
23 song “Pretty Woman” was fair use); *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir.  
24 1982) (taking photographs of screen images for an entire film and tape recording  
25 the audio in order to gather evidence of an ordinance violation was considered fair);  
26 *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (transforming full  
27 photographs into thumbnail images for a website was fair use); *Seltzer v. Green*  
28

1 *Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013) (Green Day’s use of the entire  
2 *Scream Icon* image as a concert display was fair use).

3 Bain tries to argue that the use of “40 different scenes” constitutes a  
4 substantial use of the Film. However, describing each of these as “scenes” is  
5 misleading considering that almost all of the “scenes” are less than 10 seconds in  
6 length (for clarity we will describe each “scene” in the Reel as clips). Because of  
7 the brevity of these clips, and the limited use of any dialogue from the Film, one  
8 can hardly grasp the context of the scene when viewing the Reel because most of  
9 the scene and dialogue has cropped out for the Reel. Below is a summary of the  
10 clip usage within the Reel:

- 11 • 25 of the 40 clips are visuals of Haid’s acting without any dialogue;
- 12 • 26 clips are less than 3 seconds in length;
- 13 • 5 clips are between 3 and 5 seconds in length;
- 14 • 7 clips are between 5 and 10 seconds in length;
- 15 • 2 clips are over 10 seconds in length.

16 SUF ¶ 140.

17 Of the clips that are over 10 seconds in length, one clip is 18 seconds and the  
18 other is 1 minute and 9 seconds. SUF ¶ 141. The 18-second clip is taken from a  
19 bathroom scene in the Film that is originally 2-minutes and 14-seconds in length,  
20 starting from the timestamp 33:03 in the Film and continuing until 35:17. *Id.* This  
21 clip contains 6 words from Cap, none of the dialogue from Jamie or Kim, and omits  
22 1 minute and 56 seconds of the original bathroom scene. *Id.*

23 Meanwhile, the 1-minute and 9-second clip is taken from a “motel scene”  
24 which Bain claims to be the “most critical interaction between the Film’s two main  
25 characters.” See Opposition p. 12. This original motel scene is approximately 2-  
26 minutes and 37-seconds in length, starting from the timestamp 42:49 in the Film  
27 and continuing until 45:26. SUF ¶ 142. The clip concentrates primarily on Shara’s  
28

emotional performance opposite Jamie, while only including portions of Jamie’s dialogue to provide context to what Shara is saying. *Id.* Although this clip appears to be one continuous scene, in actuality the clip consists of three separate segments from the motel scene merged into one (i. 42:49 to 43:23, ii. 43:50 to 44:08, and iii. 44:47 to 45:26). *Id.* The portions that were omitted from the Reel consist mainly of Jamie’s dialogue from the motel scene. SUF ¶ 143. Thus, even in this “critical interaction” between Shara and Jamie, the Reel focuses Shara’s emotional performance and eliminates much of Jamie’s “interaction.”

Finally, when comparing the quantity of the dialogue in the Reel versus the quantity of dialogue in the Film’s final script dated October 2014 [*See Haid’s MSJ*, Ex. 3, Dkt. 116-1, pp. 9-113] (“Script”), one gets an even greater sense that the Reel contains too little of the Film’s content to warrant a finding of infringement. Below is a table consisting of the Film’s prominent characters, comparing the amount of lines from that character in the Reel versus the amount of lines for that same character in the Script.

Character Name	Audible Lines in the Reel	Visible Lines in the Script <sup>1</sup>
Shara	17	229
Jamie	6	168
Kim	2	81
Bridgette	1	52
Cap	1	34
Louie	1	33
Madame Yeva	0	28
Alin	0	19

<sup>1</sup> These totals were calculated by counting the number of times that a character’s name was depicted in ALL CAPS in the Script, which is approximately the amount of times that a character has a speaking line in the Film. SUF ¶ 144. The amount of speaking lines in the Film may vary slightly as the Film may have been edited in a manner that is not 100% true to the Script. *Id.*

Sero	0	16
Tom	0	11
Hank	0	8
Will	0	8
Stosh	0	5
Motel Manager	2	4
Kristi	0	3
Lisa	0	3

Comparing the quantity of dialogue in the Reel versus the quantity of dialogue in the Script, the Reel contains approximately 4.2% of the total dialogue from the characters above, with the majority coming from Haid’s character, Shara. *SUF* ¶ 145. This demonstrates that the Reel contains only the amount that is necessary to display Haid’s acting ability.

Bain further argues that she created an acting reel for Haid, and thus there was no need for Haid to commission the creation of the Reel. However, Haid does not have a copy of this acting reel, and the acting reel created by Bain did not convey Haid’s ability to act. *SUF* ¶ 146. Bain also claims that a reel must be no more than 2 minutes in length. This is hardly an industry requirement as the appropriate length of a reel is subject to differing opinions. *See e.g.* Donaldson Report, p. 8 (the length of an acting reel “ranges anywhere from one or two minutes to three or four minutes”).

*iv. Effect on the Potential Market*

As discussed in the MSJ, Haid’s Reel had no market effect on the Film whatsoever. Bain argues that unrestricted and widespread publication of previously unreleased footage in the Reel has the potential to decimate the value of a film. However, the Reel is not intended for consumption by the general public – it is meant solely for prospective employers and is provided to them for free. Haid never intended to make the Reel subject to unrestricted and widespread publication. Haid

1 never made her Google Drive link available to anyone other than LA Media.

2 Furthermore, Bain still has not provided evidence of any actual damages.  
3 The Film was already exhibited to the public by the time the Reel was created. SUF  
4 ¶ 148. The creation of the Reel did not affect Bain’s ability to obtain a distribution  
5 deal whatsoever, and once the Film was released on commercial platforms in May  
6 2018, it became the “#1 Trending Movie on AMAZON PRIME,” “#1 Most Popular  
7 Movie on TubiTV.com,” and “Top 5 Trending Movie on Apple TV” by June. SUF  
8 ¶ 149. Bain even testified in her deposition that she does not possess any evidence  
9 of actual damages to the Film. SUF ¶ 150. Bain argues that the likelihood of market  
10 harm may be presumed when an intended use is for commercial gain. There is no  
11 direct commercial gain, or even a promise of commercial gain, for Haid regarding  
12 her use of the Reel. The Reel is simply a tool to convince casting directors to grant  
13 Haid auditions for future roles. Bain may argue that this factor does not favor either  
14 party if the market harm in play is “hypothetical,” but there is nothing hypothetical  
15 about the fact that the Film suffered no damages from Haid’s actions.

16  
17 **c. Bain Still Has Not Produced Any Evidence That Haid Had**  
18 **Knowledge or Reasonable Grounds to Know that Distribution of**  
19 **the Reel “Will Induce, Enable, Facilitate, or Conceal” Copyright**  
20 **Infringement.**

21 Bain still does not have evidence that Haid had knowledge or reasonable  
22 grounds to know that distribution of the Reel “will induce, enable, facilitate, or  
23 conceal” copyright infringement.

24 Haid did not violate § 1202 when allegedly sharing the Film with LA Media  
25 because the CMI was still present. *See* Opposition, Ex. 12. Bain blatantly  
26 misconstrues Google Drive’s computer mechanics as functioning in the same  
27 manner and purpose as CMI. The “owner” information, in the context of Google  
28 Drive, only identifies the owner of the digital file in Haid’s Google Drive account.

1 It does not suggest that “Haid owns the Film” or that “use of the Film was subject  
2 only to Haid’s approval.” Haid did not alter any metadata from the digital video  
3 file, nor did she remove any CMI before providing LA Media with a copy of the  
4 Film. *SUF* ¶ 152. There is no proof that Haid knowingly identified herself as the  
5 owner.

6 Additionally, Haid did not violate § 1202 when Oosterhouse saw the Reel.  
7 Bain has no evidence that Haid ever intended to mislead Oosterhouse as to the  
8 Film’s title, authorship, copyright ownership, or any other credit to the Film.  
9 Furthermore, Bain has no evidence that Haid intended to “induce, enable, facilitate,  
10 or conceal” copyright infringement by sharing the Reel with casting directors.  
11 Haid’s only purpose for the Reel was to show off her acting ability. Haid has never  
12 held herself out to be a director, producer, or copyright owner of the Film. *SUF* ¶  
13 153.

14 Bain has the burden of presenting affirmative evidence that Haid possessed  
15 the requisite mental state to violate § 1202. *Stevens v. Corelogic, Inc.*, 899 F.3d  
16 666, 673 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1222, 203 L. Ed. 2d 208 (2019).  
17 Bain therefore cannot prevail on a § 1202 claim by simply identifying the general  
18 *possibility* that the removal of CMI will induce, enable, facilitate, or conceal  
19 copyright infringement. *Id.* As a result, Bain’s claim for violation of § 1202 fails.

## 20 21 **II. CONCLUSION**

22 For the reasons presented in Haid’s Motion for Summary Judgment and/or  
23 Adjudication, and further support articulated herein, the Court should grant Haid’s  
24 Motion and dismiss Bain’s Complaint in its entirety.

25  
26 Respectfully submitted.

27 Dated: July 27, 2020

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